SUPREME COURT, U. S.

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No. 876

In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES CAMPIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner was convicted in the United States District Court for the Northern District of Illinois, Eastern Division, on two counts of having wilfully attempted to evade his individual income tax for the years 1960 and 1962, in violation of Section 7201 of the Internal Revenue Code, and of having wilfully made and subscribed, under the penalties of perjury, false Small Business Corporation Returns of Income for M. Campione & Son, Inc., mason contractors, for the same years, in violation of Section 7206(1) of the Code.

The sole question raised by the petition is whether Petitioner's motion to suppress evidence should have been granted. The relevant facts are as follows:[1]

Special Agent Berwick first met petitioner in June, 1963. At their first meeting Berwick stated that he was not examining petitioner's returns but wanted some information on Manny Skar and the Sahara Motel. (R. 596–597, 609.) At that time, as far as Agent Berwick knew, Sam Barlow and Enterprise Steel Erectors Co., were (like M. Campione & Son, Inc.) among the contractors who had performed work on the Sahara Motel for Skar (R. 642). However, on July 24, 1963, after Berwick told petitioner he was also interested in Barlow and Enterprise, petitioner (in the presence of his attorney) advised Berwick that he *was* Barlow, and that both Barlow and Enterprise were fictitious accounts which were used by him in order to get discounts on the purchase of materials from a supplier named Edmier (R. 644, 662; Pet. 5, 11).[2] The conversations petitioner had with Berwick on this date and two days later (July 26, 1963) both took place in the office of petitioner's attorney, Marshall Harris, and both related to Berwick's investigation of Manny Skar and the Sahara Motel (R. 668). Sometime in July, 1963, Harris told Berwick that "if an investigation was opened up

[1] As we shall show, the motion to suppress properly relates only to the records of Enterprise Steel Erectors Co., a partnership of which petitioner and his father were partners (R. 392).

[2] This statement, which was first brought out on cross-examination, is the only incriminating oral admission by petitioner ever testified to by Agent Berwick.

[on petitioner] that he should contact him, that he was representing" petitioner (R. 613–614).

In June 1963, petitioner gave his accountant, Leff, canceled checks, deposit slips and a check stub book of Enterprise Steel Erectors Co. and asked Leff to make up records for 1962 for Enterprise and also to prepare a delinquent partnership return of income for Enterprise (R. 390–391).[3] The records thus prepared for Enterprise by Leff were turned over to Special Agent Berwick by petitioner's attorney, Harris, on August 2, 1963 (R. 586). These records (Govt. Exs. 4B, 4C) reflected that money from Enterprise was used to purchase approximately $25,000 worth of stock in the name of Sam Barlow and that Enterprise had $41,149.67 of cash on hand at the end of 1962. It was upon examining these records, on or shortly after August 2, 1963, that Berwick first discovered evidence of fraud on the part of petitioner (R. 607, 610). He thereupon wrote a memorandum to the Chief of Intelligence for whatever action he deemed necessary (R. 611). The Chief of Intelligence recommended that a preliminary investigation be commenced (R. 611) and the case was assigned to Berwick on August 8, 1963 (R. 550, 611). From August 2, 1963, until March of 1964, Berwick had no contact with petitioner.

In March or April, 1964, Berwick requested that Harris provide him with records of M. Campione & Son, Inc., for examination in regard to petitioner's

[3] During the year 1962, Leff had no knowledge of the existence of Enterprise (R. 392).

income tax liability (R. 642). In June, 1964, Berwick sent Harris a registered letter notifying him officially that a case had been opened on petitioner and enclosing a subpoena for the corporate records of M. Campione & Son, Inc. (R. 642).

Of course petitioner does not contend that these corporate records should have been suppressed, since they were not subject to the Fifth Amendment privilege against self-incrimination. *United States* v. *White*, 322 U.S. 694. Nor does he really contend that any incriminating oral admissions should have been suppressed, for a careful reading of Berwick's testimony (R. 544, *et seq.*) discloses that he testified to no such admission with the sole exception of the statement by petitioner in July, 1963 (at a time when petitioner concedes he was not under investigation) that he and Sam Barlow were one and the same, *supra*, p. 2. Although the court below speaks of "incriminating statements" (Pet. App. 4), it seems clear that what petitioner was really contending below, and what he contends here, is that the Enterprise partnership records which were turned over to Agent Berwick on August 2, 1963 (*supra*, p. 3) should have been suppressed.

There is a fundamental error which permeates the petition (Pet. 5, 11) and upon which petitioner's whole argument rests, and that is the notion that Special Agent Berwick first suspected fraud on July 24, 1963. This is not correct. Berwick testified that his first discovery of evidence of fraud on the part of petitioner came on or shortly after August 2, 1963, when he examined the Enterprise records, *supra*, p. 3 (R. 607,

610). In view of the denial of the motion to suppress by the district judge, it must be assumed that he believed this testimony. There is no evidence to the contrary, *i.e.*, no evidence to support petitioner's theory (Pet. 5, 11) that the relevant date was sometime in July, 1963, and hence that the Enterprise records should have been suppressed. Since Berwick's activities, prior to the time the Enterprise records were turned over to him, were directed solely toward the Skar-Sahara investigation, the motion to suppress the Enterprise records was properly denied. This was the theory upon which the court of appeals affirmed the district court's denial of the motion (Pet. App. 5).

Petitioner relies (Pet. 12, *et seq.*) upon *Miranda* v. *Arizona*, 384 U.S. 436, for the proposition that he should have been warned of his constitutional rights. That case is inapplicable here because (1) there was no custody nor other deprivation of petitioner's freedom of action and hence *Miranda* does not apply,[4] and (2)

[4] It is true that the Seventh Circuit has held, in *United States* v. *Dickerson*, 413 F. 2d 1111, that when a special agent of the Internal Revenue Service first suspects a taxpayer of fraud he must give him the full warnings of constitutional rights set forth in *Miranda*, even though the taxpayer be not in custody at the time. This holding is contrary to holdings in eight other circuits, all of which have held the precise opposite. But whatever the merits of its *Dickerson* holding, the court below was plainly right in not applying it here, because (1) it is prospective only, relating to interrogations conducted and records obtained after July 28, 1969, the date of the *Dickerson* decision; (2) petitioner was arguing not a failure to warn but affirmative deceit on the part of Berwick; (3) the case involves nothing more than the failure to suppress the Enterprise records, and Berwick did not suspect fraud on petitioner's part at the time he received those records; and (4) petitioner's attorney was present during all of the interviews of any consequence.

there were no incriminating oral admissions or any turning over of privileged records after August 2, 1963, when Berwick—as a result of examining the records of Enterprise—first suspected fraud on the part of petitioner.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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